

Senator Richard J. Durbin

1. In my home state of Illinois, gun trafficking is a large problem. In fact, almost 47% of the crime guns traced in Illinois were originally bought in another state. This is the ninth highest out-of-state crime gun rate in the nation. However, during the three-year period between October 1, 1999 and September 30, 2002, federal prosecutors filed only 16 gun trafficking cases in Illinois. According to a recent report by Americans for Gun Safety, the lack of enforcement for these crimes is a nationwide problem. Although the overall number of federal prosecutions has increased under President Bush, 94 percent of the increase is due to aggressive enforcement of federal laws regarding the prosecutions of felons and other prohibited buyers in possession or buying a firearm and the use of a firearm in cases of drug trafficking or other violent felonies.

- A. Although I appreciate the strides the Department of Justice has taken with respect to these two federal firearm laws, as Assistant Attorney General for the Criminal Division, how would you promote the prosecution of the remaining 20 major federal firearm laws, and in particular those regarding gun trafficking?

Investigating and prosecuting gun traffickers has been, and will remain, a top priority for the Justice Department. During my tenure in the Deputy Attorney General's office, I devoted a significant portion of my time to the Department Project Safe Neighborhoods initiative, which is designed to reduce gun violence across America. Project Safe Neighborhoods combines vigorous federal law enforcement with state and local partnerships to ensure that gun crimes are prosecuted in the appropriate venues. If confirmed as Assistant Attorney General, I would seek to ensure that the Criminal Division continues to play an important role in prosecuting gun crime and developing policy, including reviewing existing statutes and penalties for gun trafficking and working to coordinate the investigation and prosecution of interstate trafficking crimes.

To ensure effective law enforcement, prosecutorial decisions regarding gun crimes must be made on a case-by-case basis in accordance with the strategies developed by U.S. Attorney's offices and federal, state, and local law enforcement officials. The charging decision in each gun trafficking case includes an evaluation of which federal statute or statutes best apply to the evidence, as well as what penalties will result upon conviction. Therefore, in some cases criminal conduct that constitutes or includes gun trafficking may be prosecuted under other statutes; those cases may not be reported as gun trafficking convictions or considered as such by persons later evaluating reported data. For example, a gun trafficker who can also be prosecuted under the felon-in-possession statute in some cases would face a stiffer penalty. Moreover, given limited resources, the federal government cannot prosecute every violation of the federal firearms laws; therefore, prosecutors

focus on the most serious and dangerous offenders such as those with previous felony convictions or who engage in violence or drug trafficking. Accordingly, the Department has made a concerted effort to focus its attention and resources on those offenders, and the statutes applicable to them.

If confirmed as Assistant Attorney General of the Criminal Division, I would encourage federal prosecutors to use whatever federal firearms laws are appropriate to each case, would result in the most significant sentence, and have the highest likelihood of removing violent offenders from our communities. I am convinced that Project Safe Neighborhoods will continue to produce vigorous and effective enforcement of federal firearms laws.

- B. Do you believe there are sufficient resources to prosecute all 22 major federal firearm laws? If not, specifically which resources should be increased?

As reflected in its Project Safe Neighborhoods initiative, prosecuting and convicting violent firearms offenders is one of the Department's top priorities. At the same time, we are mindful of our obligation to manage our resources wisely and continue to do more with less. For this reason, the Department has made a concerted effort not only to focus our prosecutorial resources on the most serious and dangerous offenders of our gun laws, but also to help and encourage our state and local counterparts to strengthen their own efforts.

It is my understanding that for FY 2004, the Department is requesting additional resources to support its violent crime related programs. We believe that the 2004 request, if fully funded, will enable us to meet the Department's goals. The Department is also benefitting from the extraordinary expertise and resources brought to the federal enforcement of gun crimes by ATF, which became part of the Department in January 2003.

- C. I understand that many prosecutors believe penalties for gun trafficking are insufficient. Therefore, Senator Schumer and I have introduced the Gun Trafficking Penalties Enhancement Act of 2003 (S. 1243) to increase the penalties for four of the five gun trafficking offenses, by doubling the maximum sentence to 20 years and setting the minimum sentence for all four offenses at 33-41 months. This bill also would provide for possible prosecution for these four offenses under the RICO statute. Would you support this bill? Why or why not?

It is my understanding that the Department has not yet taken a formal position on your bill. Let me assure you that if confirmed as Assistant Attorney General, I would be committed to ensuring that gun traffickers receive appropriate penalties for their serious criminal violations. Indeed, during my tenure as an Assistant United States Attorney, I personally

prosecuted a number of gun trafficking cases (obtaining convictions both through guilty pleas and, in two cases, by jury verdict) in which defendants had illegally purchased guns in Georgia and transported them to cities in other states.

Moreover, consistent with your legislation's premise, the Department is currently considering whether penalties in this area are rigorous enough. In February 2003, the Attorney General directed the Criminal Division to "review the experience under existing Federal Sentencing Guidelines for firearms trafficking cases and to make appropriate recommendations for seeking an increase in the Guidelines." The Attorney General's directive makes clear that certain current penalties may be inadequate, and that the punishment for traffickers should be sufficient to deliver a strong deterrent message. The Criminal Division, in consultation with other interested components in the Department, is currently developing its recommendation to the Attorney General in response to that directive.

- D. What other steps can Congress take to assist the Department of Justice in enforcing federal firearms laws, and in particular, those regarding gun trafficking?

During my time in the Deputy Attorney General's office, I was continually grateful to Congress for the support it provided in our efforts to combat illegal gun trafficking and other serious gun crimes. We depend on this partnership to focus the public's attention on critical law enforcement issues, and we are thankful for the continued funding that the Congress provides, especially for the Project Safe Neighborhoods initiative. Of course, as you know, the problems of gun violence and gun trafficking are very difficult ones, and do not submit to easy answers. If confirmed as Assistant Attorney General, I would welcome the opportunity to work with you and other Members of Congress to find new and creative ways to enhance our progress in reducing gun violence in America, and to keep our families and communities safe.

2. In your position in the Deputy Attorney General's office, you have overseen the Justice Department's war on terrorism from the prosecution side. Let me ask you about what I view as one of the most basic rights of our legal system – the constitutional right to counsel. In the wake of the recent 40th anniversary of the case *Gideon v. Wainwright*, some commentators have criticized the Justice Department for its breach of *Gideon* principles. Jose Padilla and Yaser Esam Hamdi, two U.S. citizens, are being detained by the U.S. government as “enemy combatants” and denied access to counsel.

- A. How can you reconcile *Gideon* with the Justice Department's position that Mr. Padilla and Mr. Hamdi are not entitled to access to counsel?

The current war – which unfortunately has included acts of war carried out on our own soil, and acts against our Nation carried out by United States citizens – has raised complicated and challenging legal issues. The Attorney General has repeatedly reminded the Department's prosecutors and agents that their efforts in this war must remain within the bounds of the Constitution. Therefore, in analyzing complex issues such as those raised by the detention of enemy combatants, officials within the Department of Justice have relied on the expert advice of attorneys within the Office of Legal Counsel, the Office of the Solicitor General, and other components. My involvement in prosecuting the war on terrorism has been informed by this advice and analysis.

Gideon was a criminal case, and its holding was based on the Sixth Amendment, which applies only to criminal cases. The Sixth Amendment provides that “*in all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.*” There are no criminal charges pending against Padilla or Hamdi, and therefore the right-to-counsel guarantee of the Sixth Amendment does not apply to them.

I would note, however, that both Padilla and Hamdi have received the benefit of court-appointed counsel for the purpose of seeking habeas review of the legality of their detentions, and these counsel have vigorously contested the right of the government to detain them as enemy combatants. In the case of Hamdi, the United States Court of Appeals for the Fourth Circuit has already upheld the legality of his detention, notwithstanding his access-of-counsel claims. *Hamdi v. Rumsfeld*, 316 F.3d 450 (Jan. 8, 2003). Litigation pertaining to Padilla's detention – and his right to consult with counsel – is ongoing.

B When is it appropriate to deny the right to counsel to U.S. citizens?

As a former defense attorney, I have a special appreciation for the importance of a criminal defendant's right to counsel, and agree that, where such a right exists, it must, of course, be honored. As the Administration has argued in the Padilla and Hamdi cases, however, a United States citizen detained as an enemy combatant enjoys no such right. The rights the Constitution affords persons in the criminal justice system simply do not apply in the context of detention of enemy combatants. The Sixth Amendment does not provide a right to counsel to enemy combatants because it applies only after the formal initiation of criminal charges. See *Texas v. Cobb*, 532 U.S. 162, 167-68 (2001) (the Sixth Amendment right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information or arraignment") (internal quotation marks omitted); cf. *Ex parte Toscano*, 208 F. 938, 940 (S.D. Cal. 1913) (Sixth Amendment has no application to internment of belligerent forces because such detention "in no way relates to a criminal prosecution"). Similarly, the Fifth Amendment's Self-Incrimination Clause provides a trial right to criminal defendants and the right to counsel that the Supreme Court has inferred under that Clause is designed to protect a criminal defendant's rights at trial. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (violation of Self Incrimination Clause "occurs only at trial"). There is also no Due Process Clause right for enemy combatants to have access to counsel. Indeed, the United States military has captured and detained enemy combatants during the course of virtually every major conflict in the Nation's history and, so far as I know, it has never even been suggested that such prisoners have a right of access to counsel to challenge their detention. Counsel has been provided when those combatants have been prosecuted for war crimes or violating other military regulations.

An enemy combatant does not have a general right of access to counsel under the laws of war either. The President has determined that members of the Taliban and the *al Qaeda* terrorist network do not qualify for status as prisoners of war entitled to the rights and privileges of the Geneva Convention on the Treatment of Prisoners of War ("GPW"). See *United States v. Lindh*, 212 F. Supp. 2d 541, 557-558 (E.D. Va. 2002) ("On February 7, 2002, the White House announced the President's decision, as Commander in Chief, that the Taliban militia were unlawful combatants pursuant to GPW and general principles of international law, and, therefore, they were not entitled to POW status under the Geneva Conventions."); White House Fact Sheet, Status of Detainees at Guantanamo, Feb. 7, 2002 (www.whitehouse.gov/news/releases/2002/02/20020207-13). Even if the protections of GPW did apply, the Geneva Convention clearly permits the

detention of members of enemy forces *without* access to counsel. The Convention requires the detaining power to provide counsel only when a prisoner is *charged* with a war crime or violation of disciplinary regulations during his period of confinement. *See* GPW art. 105. It does not require a detaining power to provide access to counsel for any prisoner of war who is detained.

3. I voted for the USA Patriot Act but am concerned that it may have gone too far. It was introduced and passed at a time when the nation was gripped with fear.
 - A. Do you believe that the USA Patriot Act sunset provision was advisable? Do you think it should be eliminated?

The Department is very grateful for the law enforcement tools provided by Congress in the USA Patriot Act that have allowed us to take strong measures to enhance the security of this Nation. I believe that until terrorism has itself “sunset,” these invaluable legal tools should remain in place. At the same time, however, I also recognize the importance of Congress’s oversight role regarding the Department’s use of these authorities. If confirmed, I look forward to working with Congress on these important issues.

- B. Did the USA Patriot Act provide the Justice Department with everything it needed to fight the war on terrorism most effectively? If not, what more do you believe is needed?

The USA Patriot Act provided the Department of Justice with many important resources for fighting terrorism – including integrating law enforcement and intelligence capabilities and extending to the war on terrorism a number of tools previously used to combat organized crime and drug dealers. However, as recent indictments have shown, terrorism is still a real threat to our nation, and fighting it remains the first priority of the Department of Justice and the Criminal Division. Recently, the Attorney General highlighted several areas where changes to the current law would allow the Department of Justice to more effectively carry out its mission. These included applying to terrorism offenses the presumption against pretrial release that applies to many other crimes; clarifying that training with or enlisting in terrorist organizations constitutes criminal material support; and establishing a clear authority under which terrorism hoaxes can be prosecuted. If confirmed to lead the Criminal Division, I would seek to use all current legal tools to fight terrorism, while also welcoming any further assistance provided by Congress.

- C. In implementing the USA Patriot Act, how has the Justice Department safeguarded our civil liberties?

While fighting the threat of terrorism is a paramount concern for the Department of Justice, protecting the civil liberties enjoyed by all Americans is an equally important priority. It is these rights that make this country great and worth fighting for. Since September 11, 2001, the President and the Attorney General have ensured that America's civil liberties are preserved by acting within the letter and the spirit of both the Constitution and our federal laws. The courts have clearly recognized these efforts by upholding the vast majority of Department actions that have been litigated. If confirmed, I would reaffirm to the Criminal Division and to those in the field the importance of preserving our civil liberties while carrying out the vital business of the Division.

4. In the state of Illinois, 13 people on death row were released between 1987 and 2000 after they were found to be innocent. Four of the 13 were represented by counsel who were later disbarred or suspended from the practice.

- A. Do you believe that indigent criminal defendants in the United States have meaningful access to counsel?

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984); see also *Wiggins v. Smith*, 2003 WL 21467222, ___ U.S. ___ (June 26, 2003) (reversing a death sentence because counsel failed to properly investigate "powerful" mitigating evidence that defendant had been severely abused and neglected as a child). The mechanisms for identifying and appointing qualified counsel for indigent criminal defendants vary from jurisdiction to jurisdiction, and from state to federal. Without question, the representation afforded indigent criminal defendants has on occasion been inadequate, but I believe these instances represent the rare exception rather than the norm.

It is important not to let the rare exception distort an objective evaluation of existing practices. Personally, I have been impressed with the quality of representation afforded defendants in federal court under 18 U.S.C. § 3006A. Both as a member of the defense bar and as a federal prosecutor, I had the highest respect for the court-appointed defense counsel in federal criminal cases in Atlanta, including a number of homicide cases. Federal capital defendants are entitled to the assistance of two counsel, of whom at least one must be learned in the law applicable to capital cases. See 18 U.S.C. § 3005. Additional requirements for capital counsel are also found in 21 U.S.C. § 848(q).

I am not in a position to comment specifically on the quality of legal representation in state courts. Based on news reports, it is my understanding that in the wake of extensive publicity concerning the death penalty, many, if not most, states have recently taken steps to enhance the quality of representation generally, and that afforded capital defendants specifically.

- B. How would you assess the quality of legal representation provided to indigent criminal defendants?

Although I have not had the opportunity to conduct a broad review of representation provided to indigent defendants, again, I have been personally impressed with the quality of representation afforded defendants in federal court under 18 U.S.C. § 3006A. Again, I am not in a position to comment specifically on the quality of legal representation in state courts. Based on news reports, it is my understanding, as I mentioned previously, that many, if not most, states have recently taken steps to enhance the quality of representation generally, and that afforded capital defendants specifically.

- C. As AAG for the Criminal Division, what steps would you take to assure that all defendants received competent counsel?

If confirmed as Assistant Attorney General, I would not be involved in the selection or retention of counsel for particular cases in federal court. However, as the Supreme Court reiterated in *Higgins*, this is an issue of substantial importance, and must be given adequate attention. If confirmed, I would instruct Criminal Division attorneys that if they become aware that defense counsel is not competent, they should bring it to the attention of their supervisors immediately, so that we can let the presiding judge know of our concern, and enable the judge to take appropriate action.

5. Many members of the Federalist Society believe that Congress has limited authority to pass legislation. In recent federalism cases, the Supreme Court has struck down 28 laws in the past 6 years, an extremely high number by historical standards. As a member of the Federalist Society, do you believe that Congress has gone too far in passing legislation? If so, please provide examples of federal criminal laws with which you would be reluctant to prosecute

If confirmed as the Assistant Attorney General for the Criminal Division, I would be responsible for fully enforcing the federal criminal laws as enacted by Congress and interpreted by the courts. I am firmly committed to doing so.